Detik Hartamas Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NO WA-25–528–11 OF 2019
AHMAD KAMAL J
25 JANUARY 2022

Civil Procedure — Judicial review — Application for leave to amend — Whether there was application for extension of time to amend — Whether applicant could enlarge relief prayed for in leave application once leave for judicial review had been granted — Rules of Court 2012 O 53 r 7

The applicant had filed an application seeking leave to amend its notice of application for judicial review ('leave application'), statement filed under O 53 r 3(2) of the Rules of Court 2012 ('statement') and notice of hearing for judicial review application ('judical review notice'). Based on the leave application, statement and judicial review notice, the whole crux of the applicant's case for judicial review against the respondent was whether s 44(6) of the Income Tax Act 1967 ('the ITA') applied. If it did, then the money paid to the Johor State Government would be deductible. The applicant raised the argument that the notices of additional assessment were ultra vires, illegal, void, unlawful and in excess of authority, irrational and unreasonable. The applicant had filed this application to amend (encl 36) to insert a new prayer or ground for the judicial review, a declaration that the amount of money paid to the Johor State Government for the release of the Bumiputera quota was also deductible under s 33(1) of the Act. The issues for the determination of the court were: (a) whether there was an application for an extension of time before the court; and (b) whether the applicant could enlarge the relief prayed for in the leave application once leave for judicial review had been granted.

Held, dismissing the application in encl 36 with costs:

(1) The applicant's application to amend (encl 36) was flawed and defective as it did not contain any prayer in its application for an extension of time to apply to amend out of time. The court could not entertain or grant any relief not prayed by the applicant. The extension of time was mentioned in the intitulement, grounds and affidavit in support. However, case laws seemed to suggest that without the proper pleading in the body of the application, it was fatally flawed, insufficient and could not be regarded as a substitute for a proper prayer. The applicant had further failed to account for or explain the delay in making the application to the satisfaction of the court. The court agreed with the respondent's

submission that since the time allowed for leave had lapsed, and the applicant had not alluded to s 33(1) of the ITA in the leave application and statement, the respondent had a legitimate reason to believe and was rightfully not held in suspense over whether the legal validity of the respondent's decision in disallowing the expenses under s 33(1) of the ITA was being challenged under judicial review. The act of the applicant in applying for amendment without any cogent or reasonable basis, despite the lapse of time, was clearly an attempt to re-open the case against the revenue department (see paras 14, 16, 20 & 24–25).

(2) It was the court's view that any amendment to be made to the leave application must be made within the time allowed to apply for leave ie within three months from the date of the decision. It was clear that the leave application and judicial review application could only be amended on good grounds, provided the application to amend was made within the three months' timeframe for leave. The application to amend was out of time by almost ten months since the date of the decision. The applicant had to show good grounds and obtain an extension of time. In the absence of any prayer for extension of time, the court was not seized with jurisdiction to entertain the application to amend (see paras 30 & 33–34).

(3) Upon perusal of the applicant's statement, the court was of the view that the statement was not open to amendment as the condition under O 53 r 7 of the Rules of Court 2012 was not fulfilled. Based on the wordings of O 53 r 7, the court may only allow amendments to the statement if it was regarding new matters arising out of any affidavits of the parties. In the present case, the issue of s 33(1) of the ITA was not a new matter arising out of the respondent's affidavits. The applicant had full knowledge in the course of the audit and before raising the assessment that the money paid to the Johor State Government was not allowed by the respondent as expenses under s 33(1) of the ITA. However, in filing the judicial review application, the applicant had not challenged that basis of the respondent's decision but had instead challenged the decision based on s 44(b) of the ITA (see paras 35 & 37–38).

[Bahasa Malaysia summary

Pemohon telah memfailkan permohonan memohon kebenaran untuk meminda notis permohonan untuk semakan kehakiman ('permohonan kebenaran'), pernyataan yang difailkan di bawah A 53 k 3(2) Kaedah-Kaedah Mahkamah 2012 ('penyata') dan notis pendengaran untuk permohonan semakan kehakiman ('notis semakan kehakiman'). Berdasarkan permohonan kebenaran tersebut, penyata dan notis semakan kehakiman, keseluruhan kes pemohon untuk semakan kehakiman terhadap responden adalah sama ada s 44(6) Akta Cukai Pendapatan 1967 ('ACP') terpakai. Sekiranya terpakai, maka wang yang dibayar kepada Kerajaan Negeri Johor boleh ditolak.

Pemohon menghujahkan bahawa notis taksiran tambahan adalah ultra vires, tidak sah, batal, menyalahi undang-undang dan melebihi kuasa yang diberikan, tidak rasional dan tidak munasabah. Pemohon telah memfailkan permohonan ini untuk meminda (lampiran 36) untuk memasukkan alasan permohonan atau alasan baharu untuk semakan kehakiman, satu pengisytiharan bahawa jumlah wang yang dibayar kepada Kerajaan Negeri Johor untuk pelepasan kuota Bumiputera juga boleh ditolak di bawah s 33(1) Akta tersebut. Isu untuk penentuan mahkamah ini adalah: (a) sama ada terdapat permohonan lanjutan masa di hadapan mahkamah; dan (b) sama ada pemohon boleh menambah relif yang dipohon dalam permohonan kebenaran setelah kebenaran semakan kehakiman telah diberikan.

Diputuskan, menolak permohonan di lampiran 36 dengan kos:

(1) Permohonan pindaan tersebut (lampiran 36) adalah defektif kerana tidak mengandungi sebarang alasan dalam permohonannya untuk lanjutan masa. Mahkamah tidak boleh memberikan sebarang relif yang tidak dipohon oleh pemohon. Lanjutan masa telah disebut dalam tajuk permohonan, alasan dan afidavit sokongan. Walau bagaimanapun, undang-undang kes menetapkan bahawa tanpa rayuan yang sewajarnya di dalam pliding, ianya adalah defektif dan tidak boleh diperbaiki, tidak mencukupi dan tidak boleh dianggap sebagai pengganti kepada relif yang sepatutnya dipohon. Pemohon selanjutnya gagal menjelaskan atau menjelaskan kelewatan memfailkan permohonan kepada mahkamah. Mahkamah ini bersetuju dengan hujahan responden bahawa memandangkan masa yang dibenarkan untuk kebenaran telah luput, dan pemohon tidak merujuk kepada s 33(1) ACP dalam permohonan dan pernyataan tersebut, responden mempunyai alasan yang sah untuk mempercayai dan adalah berhak tidak digantung sama ada kesahihan undang-undang keputusan responden yang tidak membenarkan perbelanjaan di bawah s 33(1) ACP telah dicabar di bawah semakan kehakiman. Tindakan pemohon dalam memfailkan permohonan pindaan tanpa sebarang asas kukuh atau munasabah, walaupun tempoh masa telah luput, adalah jelas merupakan satu percubaan untuk membuka semula kes terhadap lembaga hasil (lihat perenggan 14, 16, 20 & 24–25).

(2) Mahkamah ini berpendapat bahawa sebarang pindaan terhadap permohonan kebenaran hendaklah dibuat dalam masa yang dibenarkan untuk memohon kebenaran iaitu dalam tempoh tiga bulan dari tarikh keputusan. Adalah jelas bahawa permohonan kebenaran dan permohonan semakan kehakiman hanya boleh dipinda atas alasan yang kukuh, dengan syarat permohonan pindaan dibuat dalam tempoh tiga bulan untuk kebenaran. Permohonan pindaan telah lebih dari masa hampir sepuluh bulan sejak tarikh keputusan tersebut. Pemohon perlu menunjukkan alasan yang kukuh untuk mendapatkan lanjutan masa.

Sekiranya tiada sebarang alasan permohonan untuk lanjutan masa, mahkamah tidak mempunyai bidang kuasa untuk memutuskan permohonan pindaan tersebut (lihat perenggan 30 & 33–34).

(3) Setelah meneliti pernyataan pemohon, mahkamah berpendapat bahawa pernyataan tersebut tidak boleh dipinda kerana syarat di bawah A 53 k 7 Kaedah-Kaedah Mahkamah 2012 tidak dipenuhi. Menurut A 53 k 7, mahkamah hanya boleh membenarkan pindaan kepada pernyataan tersebut jika ianya berkaitan dengan perkara baru yang timbul daripada sebarang afidavit pihak-pihak. Dalam kes ini, isu s 33(1) ACP bukanlah perkara baharu yang timbul daripada afidavit responden. Pemohon mempunyai pengetahuan penuh proses audit tersebut dan sebelum membangkitkan taksiran bahawa wang yang dibayar kepada Kerajaan Negeri Johor tidak dibenarkan oleh responden sebagai perbelanjaan di bawah s 33(1) ACP. Walau bagaimanapun, dalam memfailkan permohonan semakan kehakiman, pemohon tidak mencabar asas keputusan responden tetapi sebaliknya mencabar keputusan berdasarkan s 44(b) ACP tersebut (lihat perenggan 35 & 37–38).]

Cases referred to

Mature Land Sdn Bhd v Atlantic Plantation Sdn Bhd [2013] 4 MLJ 565; [2013] 3 MLRA 643, CA (refd)

Mohd Ismail bin Abd Ghani (would like to be known in the identity card as Saravanan a/l Balakrishnan) v Ketua Pengarah Pendaftaran Negara & Anor [2012] 1 MLJ 707; [2011] 1 MLRH 120; [2011] 5 CLJ 660, HC (folld)

Omar Suhaimi Abu Hassan v Mahkamah Perusahaan & Anor [2014] 4 MLRA 87; [2014] 2 MELR 569; [2014] 3 CLJ 720, CA (folld)

Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2012] 1 MLJ 825, HC (refd)

Prima Nova Harta Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri (Case No WA-14–7–12 of 2019) (unreported), HC (refd)

Sharmila Pillai v Ramani a/l Periasamy Pillai [2020] MLJU 1347 ; [2020] 1 LNS 1243, HC (refd)

Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor [2013] 4 MLJ 161; [2013] 3 MLRA 525; [2013] 4 AMR 211; [2013] 4 CLJ 193, CA (refd)

Woolwich Equitable Building Society v Inland Revenue Commissioner [1993] AC 70, HL (refd)

Yick Hoe Ferrous Steel Sdn Bhd v Tribunal Rayuan Kastam [2010] MLJU 1407; [2010] 3 MLRH 454; [2011] 7 CLJ 544, IC (refd)

Legislation referred to

Income Tax Act 1967 ss 33(1), 44(6)
Rules of Court 2012 O 1A, O 53 r 3(2), 3(6), 7

Saravana Kumar (with Nur Amira bt Ahmad Azhar) (Rosli Dahlan Saravana Partnership) for the applicant.
Normareza Mat Rejab (with Syazana Safiah bt Rosman) (Revenue Counsel, Inland Revenue Board of Malaysia) for the respondent.

Ahmad Kamal J:

INTRODUCTION

[1] The applicant on 7 September 2020 filed an application by way of notice of application (encl 36) seeking, inter alia, leave to amend:

(a) the notice of application for judicial review (ex parte) dated 21 November 2019 (leave application);

(b) statement filed under O 53 r 3(2) of the Rules of Court 2012 dated 21 November 2019 (statement); and

(c) notice of hearing for judicial review application dated 13 December 2019 (judicial review notice).

[2] In gist, the applicant is seeking to amend the following:

(a) leave application:

(i) to insert a new prayer via para (1)(c) that reads:

> Further, in the alternative, a Declaration that the contribution amount for the release of the Bumiputera quota *(contribution)* is also deductible under s 33(1) of the Income Tax Act 1967 ('the ITA').

(b) statement:

(i) to insert a new relief via para (2)(1)(c) that reads:

> Further, in the alternative, a Declaration that the contribution amount for the release of the Bumiputera quota *(contribution)* is also deductible under s 33(1) of the ITA.

(ii) to re-date the statement to 7 September 2020.

(c) judicial review notice:

(i) to insert a new relief via para (1)(c) that reads:

> Further, in the alternative, a Declaration that the contribution amount for the release of the Bumiputera quota *(contribution)* is also deductible under s 33(1) of the ITA.

[3] The grounds of this application are set out in the statement and affidavit in support and are as follows:

(a) the applicant's application for an extension of time to amend the notices is on a bona fide basis and it is not frivolous whereby the applicant has no intention to delay the honourable court's time or to disobey the court's instructions;

(b) this honourable court has decided in the case of *Prima Nova Harta Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* (Case No WA-14–7–12 of 2019) (unreported) that payment for the Bumiputera quota release *(contribution)* made to State Government is an expense that can be deducted under s 33(1) of the ITA;

(c) this honourable court has decided on the case of *Prima Nova* on 29 June 2020, after this application for judicial review was made;

(d) the amendments made to the notices are not unfamiliar to the respondent as the applicant had initially requested that the contribution be given a deduction under s 33(1) of the ITA and it has also been stated in the applicant's affidavit that the contribution should also be allowed to be deducted under s 33(1) of the ITA;

(e) tax should only be paid once it is due and payable. And if the taxpayer is not bound by law to pay the tax, the tax should not be collected;

(f) as stated by the House of Lords in the case of the *Woolwich Equitable Building Society v Inland Revenue Commissioner* [1993] AC 70, has held that public authorities such as respondents should not benefit from unjust enrichment as they are emanations of the Government, which is the source and fountain of justice, and are hence bound to uphold the highest standards of probity and fair dealing;

(g) the principle stated in the *Woolwich Equitable Building Society* was adopted by this honourable court in the case of *Pelangi Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2012] 1 MLJ 825 and unanimously affirmed by the Court of Appeal. The leave application by the respondent before the Federal Court was also unanimously dismissed;

(h) the amendments are exceptionally important and vital for the applicant to assist this honourable court to evaluate and decide this application as a whole;

(i) this amendments will not harm and/or prejudice the respondent in any way whatsoever because the respondent is allowed to answer and/or reply to this application;

(j) in any case, the extension of time given does not fully prejudice the respondent in any circumstances which cannot be remedied with cost; and

(k) as the written submission has been filed, this application becomes necessary and requires the consent of the honourable court to grant leave and/or extension of time to amend the notices.

[4] After the hearing, I dismissed the applicant's application (encl 36). This judgment will contain the full reasons for the dismissal.

BACKGROUND FACTS

[5] The narration of the background facts of this case is adopted with and/or without modifications from the applicant's affidavit in support and the written submissions of both parties and can be summarised as follows.

[6] The applicant had filed the leave application to commence judicial review application on 21 November 2019. Leave was granted by this court on 9 December 2019 for the following reliefs:

(a) an order for certiorari to quash the respondent's decision in the form of notices of additional assessment for the years of assessment (YA) 2014, 2015 and 2017 all dated 11 November 2019 (decision) on the grounds that the said decision of the respondent was ultra vires, illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable; and

(b) a declaration that the respondent is bound by and shall give effect to s 44(6) of the ITA which clearly provides that any gift of money made in the basis year to a State Government or a local authority is deductible for that year in arriving at the total income.

[7] Based on the leave application, statement and judicial review notice, the whole crux of the applicant's case for judicial review against the respondent is, whether s 44(6) of the ITA applies. If it does, then the money paid to the Johor State Government would be deductible.

[8] For this reason, the applicant raised the argument that the notices of additional assessment were ultra vires, illegal, void, unlawful and/or in excess of authority, irrational and/or unreasonable.

[9] The decision of the respondent that was being challenged under this judicial review is not the act of the respondent disallowing the money paid to the Johar State Government as expenses under s 33(1) of the ITA.

[10] The sole challenge against the respondent's decision was purely on the respondent not treating the money paid as a 'gift' or contribution under s 44(6) of the ITA.

[11] The respondent's affidavits and written submission in the judicial review application it was averred that s 33(1) of the ITA was not the subject matter of the judicial review, and therefore the focus of the respondent with regard of the judicial review was only on s 44(6) of the ITA.

[12] The applicant had filed this application to amend (encl 36) to insert a new prayer or ground for the judicial review, ie a declaration that the amount of money paid to the Johor State Government for the release of the Bumiputera quota is also deductible under s 33(1) of the ITA.

THE DECISION OF THE COURT

[13] Having perused the cause papers and submissions of both parties, I am of the view that there are two issues to be determined by this court. There are as follows:

(a) whether there is an application for an extension of time before this honourable court; and

(b) whether the applicant may enlarge the reliefs prayed for in the leave application once leave for judicial review has been granted.

Whether there is an application for an extension of time before this court

[14] I find that the applicant's application to amend (encl 36) is flawed and defective as it does not contain any prayer in its application for an extension of time to apply to amend out of time. Therefore, this court cannot entertain or grant any relief not prayed for by the applicant.

[15] This has been stated in the Court of Appeal in the case of *Mature Land Sdn Bhd v Atlantic Plantation Sdn Bhd* [2013] 4 MLJ 565 at p 572; [2013] 3 MLRA 643 which held that:

> [17] It will be timely to note at this juncture that the respondent's main claim was for the specific performance of delivery of vacant possession of the said portion of land alleged to be illegally occupied. There was no claim based on a rescission or termination of the SPA and particularly, there was no plea made by the respondent for a refund of the value of the said portion of land at RM565,686.44 or that upon a refund of the said sum by the appellant, ownership of the said portion of land (51.37 acres) shall revert to the appellant. *It is trite that court cannot entertain or grant any relief not prayed for by the respondent.* (Emphasis added.)

[16] In the present case, I find that the extension of time was mentioned in the intitulement, grounds and affidavit in support. However, case laws seem to

suggest that without the proper pleading in the body of the application, it is fatally flawed and insufficient nor can it be regarded as a substitute for a proper prayer.

[17] In *Yick Hoe Ferrous Steel Sdn Bhd v Tribunal Rayuan Kastam* [2010] MLJU 1407; [2010] 3 MLRH 454; [2011] 7 CLJ 544 Aziah Ali J (as she then was) held as follows:

> [16] *In the present case the only reference to an application for leave is in the intitulement.* In the case of *Cheow Chew Khoon & Teoh Chew Khoon (Yang Berniaga sebagai Cathay Hotel) v Abdul Johari bin Abdul Rahman* [1995] 1 MLJ 457; [1995] 4 CLJ 127 Gopal Sri Ram JCA (as he then was) said:
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> > ... an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or rule of court under which the court is being moved; otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.
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> > *The purpose of intitulement is to give notice to the other party the nature of the relief sought to avoid the opponent being taken by surprise. However, the intitulement is no substitute for a proper pleading for leave which ought to be incorporated in the body of the application.*
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> [17] *The applicant has failed to pray for leave as one of the reliefs sought. I am of the view that an application for judicial review made without first applying for and obtaining leave is defective and grossly irregular and is an abuse of process. The failure to obtain leave results in the court lacking jurisdiction to hear the application for judicial review.* (Emphasis added.)

[18] In *Sharmila Pillai v Ramani a/l Periasamy Pillai* [2020] MLJU 1347; [2020] 1 LNS 1243, Ahmad Bache J held that it is insufficient to pray for relief in the affidavit in support as the court may only entertain prayers in the body of application when His Lordship held that:

> [43] Ramani in his notice of application prayed for 2 specific orders. But in para [15] of Ramani's affidavit in reply—2 (encl (34)), *he is praying for reliefs not prayed for in the notice of application. This court agreed that it should not be entertained.* (Emphasis added.)

[19] Based on the above, it is clear that there is no application for extension of time before this court for this court to exercise its discretion to grant an extension of time as prayed for in encl 36.

[20] Further, I find that the applicant had failed to account for or explain the delay in making the application to the satisfaction of this court (see *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the occupants of Kampung Bukit Koman, Raub, Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor*

[2013] 4 MLJ 161 at p 171; [2013] 3 MLRA 525; [2013] 4 AMR 211; [2013] 4 CLJ 193 at p 207).

[21] Even if I were to accept the applicant's contention that the applicant has in its notice of application prayed for leave to be granted for amongst others, an extension of time which was detailed in the applicant's notice of application, the question to be considered by this court is whether there is any good and material reason given by the applicant to clarify the circumstances for the delay.

[22] I find that the applicant is relying on the decision of this court in *Prima Nova Development Sdn Bhd v Director General of Inland Revenue* that was delivered on 29 June 2020 as an explanation for the delay. However, I find that the reason does not amount to a 'good reason' based upon the following grounds:

(a) since the decision in *Prima Nova* was delivered on 29 June 2020, there is no reason given as to why the application to amend was only filed on 7 September 2020 ie after the affidavits had been exhausted and submissions had been filed. No reasons had been given by the applicant for the delay;

(b) the act of the applicant in filing the application to amend so late in the day, is clearly an afterthought and prejudicing the respondent's case, particularly since this was done after having the benefit of sighting the respondent's written submission which had raised this point to support the respondent's case;

(c) based on the above, it is clear that the applicant's proposed amendment is a tactical manoeuvre to circumvent the respondent's objection;

(d) further, I find that there is no shred of evidence given in the affidavit in support to show that the facts in *Prima Nova* applies to the applicant; and

(e) added to that, in contrast to the instant case, the decision in *Prima Nova* is a tax appeal case emanating from the appeal filed before the Special Commissioners of the Income Tax (SCIT). Hence, all facts therein had been adduced by way of witnesses and documents and the decision of the High Court was made based on the case stated.

[23] The applicant further submits that the amendment application will not cause prejudice to the respondent. However, I am of the view that although it may be argued that no prejudice had been shown, that by itself is not good enough. Authority in support of such a proposition can be found in the case of *Mohd Ismail bin Abd Ghani (would like to be known in the identity card as Saravanan a/l Balakrishnan) v Ketua Pengarah Pendaftaran Negara & Anor* [2012] 1 MLJ 707; [2011] 1 MLRH 120; [2011] 5 CLJ 660 where Aziah Ali J

(as she then was) held as follows:

> [11] Having considered the explanation for the delay, I find the applicant's explanation that he needed time to find a lawyer and his lawyer needed time to check his matter and his difficulty in getting leave to meet with his solicitor are not satisfactory to account for the delay. *In my considered opinion it is immaterial whether the delay does not occasion any prejudice to the respondent or a third party. The submission of no prejudice caused is not a satisfactory explanation for delay in filing for judicial review. I agree with learned senior federal counsel that the applicant has failed to satisfactorily explain the reason for the approximately six months' delay in making this application. On this ground alone the application for extension of time ought to be dismissed.* Consequently the court has no jurisdiction to hear the application for leave. In *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704; [2008] 6 CLJ 805, Abdul Hamid Embong JCA (as His Lordship then was) said that the court may exercise its jurisdiction only upon obligatory compliance with the imperative requirement of time set under O 53 r 3 of the RHC (see also *Ravindran v Malaysian Examinations Council*). Whether the application for an order of certiorari has merits or not is irrelevant). (Emphasis added.)

[24] I agree with the respondent's submission that since the time allowed for leave had lapsed, and the applicant had not alluded to s 33(1) of the ITA in the leave application and statement, the respondent had a legitimate reason to believe and was rightfully not held in suspense over the fact whether the legal validity of the respondent's decision in disallowing the expenses under s 33(1) of the ITA is being challenged under judicial review.

[25] However, the act of the applicant in applying for amendment without any cogent or reasonable basis, despite the lapse of time, is clearly an attempt to re-open the case against the Revenue.

[26] The applicant further submits that O 1A of the ROC can cure any technical non-compliance with the rules, if this court thinks that the applicant had committed such non-compliance.

[27] However, I find that there are a plethora of authorities to say that O 1A of the ROC does not cure the mandatory nature of O 53 r 3(6) of the ROC.

[28] Aziah Ali J (as she then was) in the case of *Mohd Ismail bin Abd Ghani* held:

> [10] Counsel for the applicant relies on O 1A of the RHC. It is worthwhile to refer to the judgment of Zaki Tun Azmi CJ in the case of *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 1 MLJ 625; [2009] 4 CLJ 329; [2009] 1 LNS 446 wherein His Lordship said as follows:

> The technical non-compliance of nay rule may be remedied where there is an accidental omission or oversight by a party. A general provision such as *O 1A of the RHC is for the court or judge to give heed to justice over technical non-compliance. It must not supersede a mandatory requirement of the Rules. O 1A of the RHC cannot be invoked when a party intentionally disregards in complying with the Rules. Otherwise, parties would be encouraged to ignore the Rules. In the context of the Rules of the High Court 1980 the phrase '… technical non-compliance …' is thus a reference to non-compliance with a rule which is not fundamental or mandatory in nature*.
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> *Therefore, I am of the view that O 1A cannot* be relied on to supersede O 53 r 3(6) which is a rule mandatory in nature. (Emphasis added.)

Whether the applicant may enlarge the reliefs prayed for in the leave application once leave for judicial review has been granted

[29] It is to be noted that the leave application for judicial review had been granted for the specific prayers prayed in the leave application and the matter is currently at the substantive stage.

[30] Therefore, it is my view that any amendment to be made to the leave application must be made within the time allowed to apply for leave ie within three months from the date of the decision.

[31] Authority in support of such a proposition can be found in the Court of Appeal case of *Omar Suhaimi Abu Hassan v Mahkamah Perusahaan & Anor* [2014] 4 MLRA 87; [2014] 2 MELR 569; [2014] 3 CLJ 720 at p 725 where it was held:

> [5] *As a general rule, courts are minded to condone non-compliance in judicial review application provided the application is filed within time* and also when it relates to constitutional challenges. These are reflected in a number of decisions. For example, the Federal Court in *National Union of Bank Employees v Director General of Trade Unions & Anor* [2013] 6 MLJ 16; [2013] 7 CLJ 957 condoned a 42 days delay in filing notice of hearing in Form 111B (now Form 110) which was required to be filed within 14 days upon obtaining leave. *However, when it relates to filing an application for judicial review out of time, a stricter approach is taken by the courts where the challenge is purely related to administrative law challenges related to executive action and/or decision of tribunal* as reflected in the decision of the Federal Court in *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johar & Ors* [2013] 3 MLJ 145; [2010] 5 CLJ 865 where the decision of *O'Reilly v Mackman* [1982] 3 All ER 1124 (HL), was approved. When it relates to constitutional challenges by way of writ or judicial review or even arising from criminal cases, time factor is not an issue and *O'Relly*'s principles do not apply. This is reflected in a number of cases … (Emphasis added.)

[32] The Court of Appeal further held that failure to seek a prayer for leave of the judicial review is fatal unless an application to amend is made within the three months period or if for some special or exceptional reason the court allows the extension of time under O 52 r 3(7) of the ROC:

> (vi) In our view failing to seek a prayer for leave in the originating application in the nature of Form 109 will be *fatal unless the applicant has filed an application to amend the originating process for inadvertence within the three months (or extended) period specified in* O 53 r 3(6) Rules of Court 2012 *or for some special or exceptional reason the court is prepared to invoke* O 53 r 3(7) which reads as follows:
>
> > The Court may, upon an application, extend the time specified in rule 3(6) and if it considers that there is a good reason for doing so. (Emphasis added.)

[33] Based on the above, it is clear that the leave application and judicial review application may only be amended on good grounds, provided the application to amend is made within three months time frame for leave.

[34] In the present case, the application to amend is out of time by almost ten months since the date of the decision. Therefore, the applicant has to show good grounds and obtain an extension of time from this court. In the absence of any prayer for extension of time, this honourable court is not seized with jurisdiction to entertain the application to amend.

[35] In the present case, upon perusal of the applicant's statement, I am of the view that the statement is not open to amendment. This is because I find that the condition under O 53 r 7 of the ROC has not been fulfilled.

[36] Order 53 r 7 of the ROC reads as follows:

> 7(1) The Judge *may allow the statement to be amended*, and may allow further affidavits to be used *if they deal with new matters arising out of any affidavit of any other party to the application*, and where the applicant intends to amend his statement or use further affidavits, he must immediately give notice of his intention and of any proposed amendment of his statement to every other party. (Emphasis added.)

[37] Based on the wordings of O 53 r 7 of the ROC, I am of the considered view that the court may only allow the amendment to the statement if it is regarding new matters arising out of any affidavits of the parties.

[38] In the present case, the issue of s 33(1) of the ITA is not a new matter arising out of the respondent's affidavits. The applicant had full knowledge in the course of the audit and before raising the assessment that the money paid to the Johor State Government was not allowed by the respondent as expenses under s 33(1) of the ITA. However, in filing the judicial review application, the

applicant had not challenged this basis of the respondent's decision but had instead challenged the decision based on s 44(6) of the ITA.

CONCLUSION

[39] Based on the aforesaid reasons, I dismissed the applicant's application in encl 36 with costs of RM1,000 to the respondent subject to the allocator.

Application in encl 36 dismissed with costs.

Reported by Mohd Kamarul Anwar